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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BILLING PLAINTIFFS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari should be granted where the grounds therefor have been manufactured, and the unanimous decision of the court of appeals declining to imply antitrust immunity ("Decision") painstakingly quotes from and is fully consistent with the long-established precedent of this Court.

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Review of Antimanipulation Regulation of Securities Offerings, Securities Act Release No. 7057, Securities Exchange Act Release No. 33,924 (Apr. 25, 1994) . . . 16

In order to try to manufacture grounds for certiorari, Petitioners mischaracterize the Decision, this Court's implied antitrust immunity standard, and the conduct which plaintiffs allege to violate the antitrust laws.

Amici's professed concerns that they are left without meaningful standards of conduct should be ameliorated if their members refrain from conspiring to conduct themselves in a manner prohibited by the federal securities laws since their inception. *See* II *infra*.

I. THIS CASE IS SUBSTANTIVELY INAPPROPRIATE FOR CERTIORARI BECAUSE THE DECISION IS CONSISTENT WITH AND EXTENSIVELY QUOTES FROM THIS COURT'S PRECEDENT ON IMPLIED ANTITRUST IMMUNITY

In a series of decisions, this Court has developed a clear legal standard for implied antitrust immunity. *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378 (1981) ("*National Gerimedical*"); *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975) ("*Gordon*"); *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975) ("*NASD*"); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) ("*Otter Tail*"); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) ("*Philadelphia National Bank*"); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) ("*Silver*"); and *United States v. Borden Co.*, 308 U.S. 188 (1939) ("*Borden*").

In vacating and remanding for continued consideration of the pending motion to dismiss[1], the Decision explicitly quoted and faithfully followed this Court's foregoing decisions. *See* Appendix ("App.") at 24a-41a, 64a-71a. For one example, the Court quoted this Court's basic standard for implied as immunity as follows:

> The basic contours of implied antitrust immunity jurisprudence are well-established. The analysis begins

1. The Court of Appeals provided important guidance for the District Court's handling of the case on remand by repeatedly citing to this Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ("*Trinko*") (*see* App. at 41a, 58a, 60a) and other cases.

> with the 'cardinal principle of construction that repeals by implication are not favored.' *Silver* [*v. New York Stock Exchange*], 373 U.S. [341,] at 357, 83 S.Ct. 1246 [1963] (*quoting United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.Ed. 181 (1939)); *see Gordon v. New York Stock Exch.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975); *California v. Fed. Power Comm'n*, 369 U.S. 482, 485, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962). 'The antitrust laws represent a "fundamental national economic policy,"' *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388, 101 S.Ct. 2415, 69 L.Ed.2d 89 (1981) (*quoting Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966)), and though, '[t]o be sure, where Congress did intend to repeal the antitrust laws, that intent governs, . . . this intent must be clear,' *id.* at 389, 101 S.Ct. 2415 (citations omitted). Implied immunity will be found only in the face of a 'plain repugnancy between the antitrust and regulatory provisions,' *Gordon*, 422 U.S. at 682, 95 S.Ct. 2598 (*quoting United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963)); *see Wood v. United States*, 41 U.S. (16 Pet.) 342, 363, 10 L.Ed. 987 (1842), only if the repeal is necessary to make the regulatory provisions work, *see Silver*, 373 U.S. at 357, 83 S.Ct. 1246, 'and even then only to the minimum extent necessary,' *id.* . . .

App. at 23a (citations and footnote omitted).

Petitioners conspicuously fail to quote or even mention the foregoing "plain repugnancy", "clear intent", and "minimum extent necessary to make the statute work" requirements of this Court's implied antitrust immunity standard. Petition, *passim*.

Because the "epic" conspiratorial conduct challenged here is prohibited by both the antitrust and the securities laws (*see* II *infra*), this case presents a situation of conceded past, present and foreseeable future **harmony** between the antitrust and regulatory statutes.

Only oxymoronically can past, present and future harmony between two statutes constitute this Court's expressly required "clear intent" of "plain repugnancy".[2]

Therefore, Petitioners must ignore essential elements of this Court's implied immunity standard, and reformulate such immunity standard to Petitioners' liking.

A. Because Petitioners' Four Novel Formulations Of This Court's Implied Immunity Standard Are Each Refuted By This Court's Precedent, Petitioners' Request For Certiorari Is Baseless

One problem with creating a new story instead of following the established standard is that you may get your story confused or vary it in retelling. Petitioners wind up offering four different immunity standards which they attribute to this Court. However, as the Decision demonstrated, each of these versions has previously been rejected by this Court.

Petitioners' first iteration of the immunity standard is as follows:

> immunity will be implied when either (i) Congress has given the SEC direct authority over the challenged conduct and the Commission has exercised that authority or (ii) the conduct at issue is subject to a pervasive regulatory scheme. In either case, immunity will be implied if application of the antitrust laws would conflict

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2. The Petitioners sought rehearing or rehearing *en banc* from the Second Circuit Court of Appeals. App. at 123a. Two panels of the Second Circuit had recently upheld Wall Street's claims for implied immunity where the challenged conduct was authorized by the SEC. *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003) (the SEC "has at times encouraged multiple listing [of equity options] and at times disapproved of that practice"); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002) (SEC had long permitted flipping).

Perhaps due to the dramatically different fact situation here, Petitioners' request for rehearing was unanimously denied (without any necessity of a brief from plaintiffs), and no Judge requested that a vote be taken concerning *en banc* review. App. at 123a.

> with, rather than merely supplement, the relevant regulatory regime – a finding that is particularly likely where the SEC has sought to strike a balance between competition and other statutory objectives.

Pet. at 5 (citations omitted). This asserted formulation dumbs down "plain repugnancy", drops the "to the minimum extent necessary" limitation, and similarly omits the Congressional "intent must be clear" aspect of this Court's standard. However, Petitioners' first iteration at least retains a faint echo of the "plain repugnancy" requirement in its "conflict rather than supplement" language.

Petitioners' later effective formulations of the immunity standard drop the "conflict" requirement in favor of a mechanistic substitute:

> Given the SEC's comprehensive authority over syndicate underwriting and manipulative conduct, its exercise of that authority over the conduct alleged here through both rulemaking and enforcement, and its statutory mandate to weigh competition concerns, the requirements for immunity set forth in *Gordon* and *NASD* are satisfied . . .

Pet. at 18. Similarly, Petitioners drop the "conflict" requirement, as well as their own, above quoted "statutory mandate to weigh competition concerns" requirement in their third formulation:

> Congress conferred on the SEC 'direct regulatory power' to supervise syndicate underwriting and the sorts of conversations during that process that plaintiffs characterize as tie-ins[, and b]ecause the SEC exercised that power, *Gordon* and *NASD* require immunity so as not to disrupt the regulatory scheme.

Pet. at 23. Petitioners' fourth version of this Court's immunity standard is this:

> As the Court held in *Gordon*, 'where the agency both has the power to control [Petitioners'] conduct and actually exercises that power,' the antitrust laws are 'ousted'

> because of the potential for conflict with the securities regulatory regime. 1A Areeda & Hovenkamp, *supra*, ¶ 243a, at 36 & n.6. In *NASD*, where the record was clear that Congress had vested in the SEC authority to regulate and supervise the challenged conduct and the SEC confirmed that its authority 'w[ould] be compromised seriously' if the antitrust case were permitted to proceed, this Court concluded that implied repeal was necessary to make the regulatory scheme work. 422 U.S. at 729-730.

Pet. at 19. Petitioners' above description drops an important qualifier from what the Treatise actually said, and misstates *Gordon* and *NASD*. What Areeda and Hovenkamp actually say is that antitrust law will be applied to "define the limits of [discretionary] private behavior. By contrast, where the agency both has the power to control such conduct and actually exercises that power with some thoroughness, the antitrust laws *may be* completely ousted." 1A Phillip Areeda & Herbert Hovenkamp, Antitrust Law (2d ed. 2000) ¶ 243 at 36 (emphasis supplied).

Gordon concerned not the "potential for conflict," but the plain repugnancy of the long-exercised power of the Securities and Exchange Commission ("SEC") to "fix" commission rates with the Sherman Act's prohibition of price fixing. 422 U.S. at 690-91. Nor did this Court imply immunity in *NASD* on the strength of the SEC's assertion that its authority would be "seriously compromised"; rather, this Court found that there could be "no reconciliation of [the SEC's] authority" to permit restrictive agreements in the secondary market for mutual funds and "the Sherman Act's declaration that they are illegal per se." 422 U.S. at 729.

B. Petitioners' Formulations That Substitute Regulatory Power And Action For This Court's Immunity Test, Violate The Express Holdings Of This Court

In purporting to supplant the three requirements listed on p. 2 *supra* with "the authority to regulate and the exercise of that authority", Petitioners violate decades of this Court's

precedent holding that conduct is not impliedly immune from the antitrust laws merely by reason of the fact that it is regulated by an agency. App. at 26a (*quoting Philadelphia National Bank*, and *Otter Tail Power*); *see National Gerimedical*.

For example, in *Otter Tail, supra*, a power company asserted that because the Federal Power Commission had the authority to compel it to interconnect with other companies and supply power to them, it should by implication be immune from antitrust charges of refusal to deal. *See* App. at 28a-29a ; *Otter Tail*, 410 U.S. at 371-73. This Court disagreed, stating that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws," and that nothing in the legislative history of the Federal Power Act revealed "a purpose to insulate electric power companies from the operation of the antitrust laws." App. at 29a; *Otter Tail*, 410 U.S. at 372, 374.

In *Philadelphia National Bank, supra*, the bank argued that the Bank Merger Act of 1940, which authorized the Comptroller of the Currency to approve bank mergers after considering "the probable effects of the proposed transaction on competition," impliedly immunized such a merger from antitrust scrutiny. 374 U.S. at 332; App. at 26a n.22. This Court held that even in the face of such agency review and consideration of "the effect of the transaction on competition (including any tendency toward monopoly)", 374 U.S. at 332 n.8, *see also* App. at 26a, Congress did not intend that the antitrust laws be impliedly repealed.

> Indeed, that there are so many direct public controls over unsound competitive practices in the industry refutes the argument that private controls of competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws.

374 U.S. at 352, App. at 28a.

As the Decision carefully explained, this Court's precedent has also refused to transform a statutory mandate to weigh

competition into an indicium of conflict. App. at 26a, 27a (citing to *Philadelphia National Bank*, where an express statutory mandate to give weight to competitive and other concerns, did not justify immunity).

On the basis of their glaringly incorrect formulation of this Court's immunity test, Petitioners argue that the Decision adopted a "novel" immunity standard which supposedly conflicts with this Court's immunity standard, warranting certiorari.

It is the Petition, not the Decision, which fails to quote and articulate this Court's legal standard, and which proposes a "novel" test (indeed, four "novel" tests). The Petition must be denied because its main ground for certiorari is non-existent.

C. Petitioners Mischaracterize The Court Of Appeals' Flexible Application Of This Court's Immunity Standard To The Facts Here

In a variation on their foregoing argument, Petitioners mischaracterize the Court of Appeals' **application** of the implied immunity standard to the unique facts here, as a new immunity standard.

1. The Decision's Non-Exclusive, Flexible Application Of This Court's Immunity Standard

In order to apply this Court's well-established legal standard to the *sui generis* facts of this case, the Court of Appeals summarized four, non-exclusive "interrelated insights" from *Gordon* and flexibly added a fifth "catch-all" consideration:

> That determination [whether to imply immunity here] is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency

> regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.

App. at 47a (footnote and citations omitted). The Court of Appeals' broad-ranging and flexible application of the implied immunity standard noted that the absence of legislative history evidencing any congressional intent to immunize tie-in arrangements was "not determinative" of whether to imply immunity. App. at 64a.[3]

On the other hand, the Court noted that the facts of this case did not fall within *any* of the non-exclusive insights of *Gordon*.[4] Having thus determined that the facts failed to support *any* of the established "insights" **and that no other** indications of implied immunity were present, the Court found that there was no plain repugnancy here. Indeed, the Court correctly went further and described Petitioners' immunity defense as "in many ways, unlike any we have seen." App. at 70a; *see* Pt. II *infra* regarding the *sui generis* aspects of the "epic" conspiracy alleged here.

2. Petitioners' Attack On The Decision's Application Of This Court's Immunity Standard Is Ordinarily Not Grounds For Certiorari And, Moreover, Is Wholly Baseless

Petitioners argue that the Decision's foregoing analysis created a "restrictive, multi-factor standard for implied antitrust immunity." Pet. at 26.

Rule 10 of this Court warns that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." However, the Decision's discussion of the "*Gordon* insights" and "any other evidence" is hardly

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3. Equally clear from the Court of appeals' review of earlier cases was the fact that immunity has been implied in the absence of one or more of the "*Gordon* insights." App. at 42a-49a.

4. *Id.* at 64a-67a.

restrictive, is not a new standard, is correct, and merely guides a broad-ranging application of this Court's standard to the facts here.

Petitioners repeatedly distort the Decision by falsely asserting that it created some "novel test" which restricts the availability of implied immunity. Examples of such distortions abound:

- Petitioners assert that "the Court of Appeals held that there is implied immunity *only* if 'Congress contemplated the specific conduct and intended for the antitrust laws to be repealed' - a novel test that comes close to imposing the same showing required for express antitrust immunity." Pet. at 11 (emphasis supplied).

The insertion of the restrictive "only," of which Petitioners complain, is their own.[5]

- Petitioners assert that "the ruling below reduces the implied immunity doctrine to a dead letter - barely distinguishable from express immunity - *by requiring an overt statement of legislative intent on the very conduct at issue, as well as a finding that the SEC has the power to compel, and has actually permitted, that conduct.*" Pet. at 13 (emphasis supplied).
- Petitioners assert that the "Court of Appeals [held] that immunity *must* be premised on the SEC's ability to 'compel the anticompetitive conduct the antitrust laws would prohibit.'" Pet. at 22-23 (emphasis supplied) (citations omitted). *See also id.* at 25 ("No court has ever before held that the SEC must be able to compel an action under the securities laws before that action may be impliedly immune.")
- Petitioners assert that requirement of a "narrowly focused indication" of Congressional intent "would undermine the

5. The Court below actually said that, where "there is a potential specific conflict between the antitrust laws and a regulatory regime," it will imply immunity if it determines that Congress so intended, a determination to be informed by the four *Gordon* insights and a fifth consideration, "any other evidence indicating that the statute implies a repeal." App. at 57a.

> securities laws by immunizing, in a dynamic and rapidly evolving field, only that conduct specifically identified by Congress 70 years ago . . . . It is unreasonable to require Congress to express a view as to unforeseeable future circumstances in order for immunity to be implied." *Id.* at 24.

Offered in each instance without citation, Petitioners' assertions of what the Court "required" are false. The Court did not require "an overt statement of legislative intent on the very conduct at issue," or "a view as to unforeseeable future circumstances." Decision, *passim*. Rather, noting that legislative history contemplating immunity had been present in both *Gordon* and *NASD*, the Court of Appeals stated that its absence in this case was, of itself, "not determinative." App. at 64a.[6] Nor did the Court of Appeals hold (or otherwise state) that the agency "must" be able to "compel" the anticompetitive conduct for immunity to be implied.

- Petitioners assert that the Decision "required a history of 'SEC authorization – whether past or present – of the specific anticompetitive behavior.'" Pet. at 25.

No such requirement appears in the decision below. What the Court of Appeals actually said was that, in its search for "indication of congressional intent to repeal the antitrust laws and immunize IPO tie-in agreements," it considered the fact that in every securities case in which immunity was implied by this Court or by the Court of Appeals, the SEC had at some point authorized the specific anticompetitive behavior at issue. App. at 55a-56a.

- Petitioners' assert that the Decision established a "requirement that a defendant identify a particular

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6. Indeed, in its analysis of *Northeast Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981), a decision rejecting implied immunity as to which this Court denied certiorari, 455 U.S. 943 (1982), the Court below expressly noted that because the "protective couplers" at issue did not exist when the pertinent legislation was enacted, other indicia of legislative intent were necessary to imply immunity. App. at 42a-43a.

'provision, sentence, phrase, or word' of the securities laws that will be 'mooted' or significantly curtailed by applying the antitrust laws . . . .'" Pet. at 26, *quoting* App. at 65a-66a.

The Court of Appeals required no such thing. The quoted language is distorted from the Decision's observation that, in its application of the established legal standard to the facts, it found no interference whatsoever with any aspect of the securities regulatory regime from application of the antitrust laws. App. 65a-67a.

The radical nature of Petitioners' argument is apparent in that, when "conflict" (let alone "plain repugnancy") between the antitrust laws and the regulatory regime is removed from the implied immunity determination, Congressional intent is also eliminated from consideration. No decision of this Court even hints at condoning such a result in determining whether to apply the disfavored (*Silver* at 357) defense of implied immunity. Petitioners' distortions further demonstrate that certiorari is wholly unsupported here.

II. FACTUALLY, THE UNIQUE PROFILE OF THIS CASE IS INAPPROPRIATE FOR CERTIORARI

No case has ever found implied antitrust immunity in the unique profile that is presented by the "epic" conspiracy alleged here: it is sufficiently reprehensible that (a) it is prohibited by the antitrust laws, and (b) such conduct also has always been, is and will in any foreseeable future be prohibited by the subsequent regulatory statute, here, the securities laws. *See* B *infra*.

A. The "Epic" Horizontal Conspiracy Of Underwriters To Inflate Underwriting Charges And Prices, Violates The Sherman Act

The Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* ("Sherman Act"), is the fundamental commercial legislation of the United States, *National Gerimedical*, 452 U.S. at 389, and the Magna Carta of free enterprise. *Trinko*, 540 U.S. at

415-416 (*citing United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)).

Section 1 of the Sherman Act prohibits agreements in restraint of trade. Where firms conspire to inflate their charges for services[7] or inflate market prices[8], they violate Section 1 of the Sherman Act.

In their Consolidated Complaint, Respondents alleged that, in violation of Section 1 of the Sherman Act, the ten largest investment banks conspired to require from customers tie-in consideration (the "anti-competitive charges") for allocations of shares of certain initial public offerings ("IPOs") and to inflate the aftermarket prices of those securities above the IPO price. Consolidated Amended Class Action Complaint ("C"), ¶¶ 1, 4(b).

The anticompetitive effects of Petitioners' "epic" conspiracy included (1) causing customers to have to pay to the defendant banks an additional tie-in charge to obtain certain IPO shares (C ¶¶ 1, 70); (2) penalizing and forcing

7. *See, e.g., In re Nasdaq Market-Makers Antitrust Litig.*, 894 F.Supp.703 (S.D.N.Y. 1995) (upholding allegations of Section 1 conspiracy to inflate the charge for market making services); *In re Public Offering Fee Antitrust Litig.*, 2004 WL 350696 (S.D.N.Y. Feb. 25, 2004) (upholding Section 1 claim that the same investment banks that are Petitioners here, inflated their underwriting charge for certain offerings).

8. *See Strobl v. New York Mercantile Exch.*, 768 F.2d 22 (2d Cir. 1985) (upholding jury verdict that defendants conspired to deflate prices on commodity exchange); *United States v. Salomon Bros., Inc.*, 57 Fed. Reg. 29,743 (1992) (settling charges that defendants conspired to amass substantial positions (reaching 100%) in the May 1991 Treasury Note in order to inflate prices; Salomon Brothers paid $290 million, including $100 million to the DOJ and the SEC, $55 million to the DOJ's asset forfeiture fund, and $100 million to a victim compensation fund); *United States v. Steinhardt Management Co. & Caxton Corp.*, 1995 WL 10627 (DOJ Notice, Jan. 13, 1995) (charging two investment fund managers with agreeing to acquire control of the April 1991 Treasury Note in order to create an artificial supply shortage designed to extract the highest price from buyers in the "secondary market," in both cash and repurchase transactions); *Three Crown Ltd. Partnership v. Salomon Bros., Inc.*, 1995 WL 422467 (S.D.N.Y. July 14, 1995) (alleging a similar conspiracy among Steinhardt, Caxton and Salomon to restrain trade in the April and May 1991 Treasury Notes).

other underwriters to impose such extra charge and to abide by the dominant investment banks' agreement (*id.*, ¶ 58); and (3) enabling Petitioners to increase their market share from 71% to 90% during the Class Period. *Id.*, ¶ 38.

In addition, another intended anticompetitive effect of the alleged "epic" conspiracy was to place in Petitioners' hands customer aftermarket orders to buy at escalating prices above the IPO price in each of the eight hundred-plus IPOs at issue here. *Id.* ¶ 4(b), 7. With these orders, Petitioners' alleged conspiracy inflated the aftermarket price spectacularly above the IPO price. *Id.* ¶ 8.

Thus, the Decision found:

> Plaintiffs allege an epic Wall Street conspiracy . . . Plaintiffs tell a compelling story and are not the first to tell it.

App., 1a-2a (listing SEC prosecutions and civil suits alleging that laddering and the tie-in agreements constitute securities law violations). The more that this "epic" conspiracy could use the laddered orders to raise the aftermarket prices **above the IPO price**, the greater the anticompetitive, tie-in charge that Petitioners' conspiracy could allegedly extract from customers[9] (*Id.* ¶¶ 42, 73, 74).

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9. Petitioners' collusive manipulation of orders, bids and prices **as a means** to inflate their charges, reprises these same Petitioners' manipulation of their bids, offers and prices in *Nasdaq*, 187 F.R.D. 466 (S.D.N.Y. 1998); and *U.S. v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235 (S.D.N.Y), *aff'd*, 153 F.3d 16 (2d Cir. 1998).

In *Nasdaq* and *Alex Brown*, these same Petitioners allegedly manipulated their bids and offers in the aftermarket in a manner that widened the so-called "spread". *Nasdaq* at 470-71; *Alex Brown* at 239. The "spread" was the difference between "the bid" and "the ask", and was a prime determinant of the market-making income of the alleged conspirators. *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F. Supp. 703, 707 n. 4 (S.D.N.Y. 1995).

The alleged intentional manipulation of Petitioners' bids, offers and prices so as to widen the spread, constituted price fixing in violation of

(Cont'd)

This enabled Petitioners' conspiracy to extract substantial anticompetitive charges from customers and inflate Petitioners' collusive, anticompetitive charges and revenues at the expense of plaintiffs and the proposed class. C ¶¶ 8, 43, 52; 67, 43 and 72.

B. Congress Also Prohibited The Challenged Conduct Here In The Federal Securities Laws

In response to the questions from the Court of Appeals, the SEC stated: "The federal securities laws and the Commission's regulations generally prohibit market manipulation, including the types of tie-in and laddering agreements alleged in the complaint in these actions." SEC's March 21, 2005 Letter to Court of Appeals, App. at 188a-189a.

Similarly, the SEC has expressly recognized that Congress has "always" statutorily prohibited in Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, tying the award of offered shares to additional commissions or other consideration, SEC Release 33-8851 (Dec. 9, 2004) at p. 15.

(Cont'd)

Section 1 of the Sherman Act. *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F. Supp. at 712-713.

Just as these same Petitioners' alleged conspiracy in *Nasdaq* profited by creating an overall wide spread to increase Petitioners' effective charge to customers, so Petitioners' alleged conspiracy here profited by creating a wide spread between the IPO price and the immediate aftermarket prices to increase the Petitioners' anticompetitive underwriting charge to their customers. C ¶¶ 1, 6, 7, 42, 62.

The parallel antitrust and securities law prosecutions present here are not at all unprecedented. *Compare Nasdaq with In the Matter of Certain Market Making Activities on the NASDAQ*, Exchange Act Re. No. 34-40900, 1998 WL 919673 (Jan. 11, 1999) (SEC prosecution of wrongdoing similar to that in the antitrust case); *see* fn 8 (parallel prosecutions in Salomon Brothers' Treasury bid rigging); *see* App. 206a at fn 6 (listing DOJ and SEC parallel investigations).

Thus, the SEC has repeatedly found, and courts have repeatedly held, that Section 17(a) of the Securities Act statutorily prohibits an underwriter from (a) requiring laddering or tie-ins; (b) manipulating prices above the IPO price; and (c) extracting other compensation as consideration for the allocation of IPOs or as a means to share in the profits of manipulation. *E.g., In the Matter of The Stuart James Co., Inc.*, [1992-93 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 85,129 at 84,089 (Mar. 17, 1993) (underwriter violates Section 17(a) by requiring laddering and tie-in agreements, and manipulating prices); *SEC v. Beres Indus., Inc.*, 90 Civ. 3260 (JCL) (D.N.J.), Litigation Release No. 12575, 46 S.E.C. Docket 1386, 1990 WL 311990 (Aug. 9, 1990) (payment of excessive underwriter's compensation in connection with manipulation of IPO aftermarket price violates Section 17(a)); *See also In the Matter of Graystone Nash, Inc. (Dennis M.)*, SEC News Release, 1995 WL 471112 (Aug. 10, 1995) (underwriter sanctioned for violations of Section 17(a) of the Securities Act and Section 15(c) of the Exchange Act for conditioning IPO allocations to "aftermarket common stock sales in certain ratios to sales of units in the offerings, and allocation of common stock to be sold in the aftermarkets at increasing artificial 'tick' prices," resulting in misleading disclosures with respect to the offering, the distribution and the underwriter's compensation).

Because the federal securities laws have "always" statutorily prohibited tie-ins and laddering, those practices were historically limited to bucket shops or marginal broker dealers with relatively much to gain from successful manipulation and relatively little reputation or capital to lose from successful prosecution. *See* cases collected *supra*.[10]

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10. Also, Section 9(a)(2) of the Securities Exchange Act, 15 U.S.C. § 78i(a)(2), prohibits individual or concerted efforts to "raise" prices, and is the "heart" of the Securities Exchange Act according to the SEC and (Cont'd)

However, between 1997 and 2000, the statutorily prohibited, reprehensible practice of laddering and tie-in agreements morphed from the shady margins of Wall Street to the jointly-imposed requirement of the ten leading investment banks, *i.e.*, the Petitioners.

C. Petitioners Cite To No Case, And Respondents Know Of No Case, Finding Implied Immunity Where The Challenged Conduct Is Statutorily Prohibited By Both The Antitrust Laws And The Regulatory Statute

In other cases finding implied immunity, the regulatory agency has compelled or authorized the conduct alleged to violate the antitrust laws. *E.g.*, *Gordon*, 422 U.S. at 659, 666 (Congress expressly permitted the SEC to fix and insure 'reasonable' rates" under Section 19(b) of the Securities Exchange Act, 15 U.S.C. § 78a *et seq*, and the SEC expressly approved such rates); *NASD*, 422 U.S. at 727-28 (Congress, by enacting Section 22(f) of the Investment Company Act, found that the "two-price" system, "boot leg" competitors and other aspects of competition in the resale market for mutual fund shares harmed and were likely to harm customers).

In *Philadelphia National Bank*, *Otter Tail*, *Borden* and *Silver*, *supra*, the regulator had **not** compelled or authorized

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(Cont'd)

commentators. *See, e.g.*, Review of Antimanipulation Regulation of Securities Offerings, Securities Act Release No. 7057, Securities Exchange Act Release No. 33,924 (Apr. 25, 1994) 59 Fed. Reg. 21,681, 21,694 (April 26, 1994).

The deliberate "raising" of the price of a security above the IPO price alleged here, is the "raising" of prices prohibited by Section 9(a)(2)-(5). *In the Matter of L.T. Lawrence & Co., Inc.*, 72 S.E.C. Docket 2199, 2000 WL 1013563 (July 24, 2000) (violations of Section 17(a) of the Securities Act and Section 9(a)(2) of the Exchange Act for manipulation of aftermarket for various IPOs); *SEC v. Covington Bros. Tech.*, 80 Civ. 6826 (S.D.N.Y.) (CWP); Litigation Release No. 9253, 1980 WL 22131 (Dec. 5, 1980) (violations of Sections 17(a) of the Securities Act and Section 9(a)(2) of the Exchange Act for manipulation of aftermarket for IPO); *Stella v. Kaiser*, 82 F. Supp. 301, 309-10 (S.D.N.Y. 1948) (manipulation of market for purpose of inducing purchase of shares of new issue).

the conduct alleged to violate the antitrust laws, and this Court's implied immunity standard was not satisfied.

Accordingly, the Decision correctly found that Petitioners' argument for immunity here is "in many ways, unlike any we have seen". App. at 70a. Implicitly recognizing as much, Petitioners mischaracterize the complaint in ways that the Decision rejects and that defy common sense. *See* Point D *infra*.

D. Petitioners Incorrectly Assert That Various Conduct Which Demonstrates Defendants' Opportunity To Conspire, Is Itself Alleged To Be Unlawful

Rule 15 of this Court requires identification of misstatements in the Petition. Petitioners seek certiorari based on one such misstatement which is the following. Petitioners pretend that the alleged evidentiary allegations of Petitioners' opportunity to conspire – underwriting syndicates, road shows, and other joint communications and joint conduct – are alleged to be unlawful or challenged here. Petition pp. 2-3. Petitioners then mention that the complaint "also" alleges that "defendant underwriters conspired to require" tie in and laddering agreements. Petition p. 4.

1. As The Decision Below Found, What The Petition Mischaracterizes As The Challenged Conduct Is Merely The Allegation Of Numerous Evidentiary Circumstances Alleging That The Petitioners Had The Opportunity To Conspire

In truth, Respondents do not allege to be unlawful or otherwise challenge underwriting syndicates, "firm commitment" underwriting, voluntary associations, etc. Thus, Petitioners' mischaracterization of the complaint was rejected by the Decision below. App. 61a fn 47 (criticizing defendants' argument as the never-accepted argument that "implied immunity should apply whenever the evidentiary

basis for an antitrust claim includes legitimate activity"). Apparently every Judge in the Second Circuit also rejected this mischaracterization which was a basis for rehearing *en banc* below. *See* fn 2 *supra*.

Instead, Respondents solely allege to be unlawful Petitioners' conspiracy to inflate underwriting charges and prices by requiring tie-in and laddering agreements. C ¶¶1-4. Respondents allege, in effect, that Petitioners formed a daisy chain of communication, communicated with one another in many contexts, and thereby had the opportunity to form, refine and carry out their epic conspiracy. If Respondents do not prove the conspiracy to require tie-in and laddering, then they fail to prove their Section 1 claim.

2. No Complaints Have Been Filed Challenging Wall Street's Everyday Conduct

Because, contrary to Petitioners' mischaracterizations, plaintiffs do **not** challenge everyday practices on Wall Street, no complaints against such conduct have been filed during the five plus years since this action was commenced. Clearly, plaintiffs allege to be unlawful only the *sui generis* conduct from the relic or time capsule of the "epic" conspiracy that allegedly existed between March 9, 1997 and December 6, 2000. C ¶25.

III. THIS CASE IS PROCEDURALLY, DECISIONALLY AND FACTUALLY INAPPROPRIATE FOR *CERTIORARI* UNDER *TRINKO* AND *GORDON*

A. Four-Fifths Of The Motion To Dismiss Here Still Has Not Been Considered By Any Court, And These Grounds Which Are As Yet Unconsidered Here Were The Basis Of This Court's Decision In *Trinko*

Petitioners cobble together their argument for certiorari from parts of *Gordon* and *Trinko*, *supra*. However, comparisons of this case to those cases illustrate important procedural, decisional and strategic reasons why certiorari was appropriate in those cases but must be denied here.

The motion to dismiss had been fully considered and decided in *Trinko*. *See Trinko*, 123 F. Supp. 2d 738 (S.D.N.Y. 2000), *affirmed in part, vacated in part*, 305 F.3d 89 (2d Cir. 2002), *reversed and remanded*, 540 U.S. 398 (2004).

In contrast, here, four-fifths of the pending motion to dismiss has still not been considered by any of the Courts below.[11] It is precisely the as yet unconsidered grounds of the motion to dismiss here which formed the basis, in *Trinko*, for this Court's decision (failure to plead a claim) and for the concurring opinion (lack of standing to sue). 540 U.S. at 410-11 and 416-17.

Although Petitioners rely heavily on *Trinko* in their arguments for certiorari, the far more advanced procedural status in *Trinko* demonstrates the inappropriateness of certiorari here. *Id.* Further, *Trinko* actually rejected implied immunity. 540 U.S. at 406.

B. The Novel Claim In *Trinko* Was Based On Benign Conduct Permitted By The Sherman Act And Mandated By The Regulatory Statute Whereas The Claim Here Is Based On Conduct Prohibited Not Only By The Sherman Act But The Regulatory Statute As Well

In essence, the plaintiffs in *Trinko* wanted to create a novel antitrust monopoly claim based on the Petitioners' alleged failure to provide sufficient aid to its own competitors. 540 U.S. at 411. Thus, competing with one's

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11. In their response to the consolidated complaint, the Petitioners moved to dismiss pursuant to F.R.C.P. Rule 12(b)(6) for (1) the affirmative defense of antitrust immunity; (2) lack of standing; (3) failure to state a conspiracy claim; (4) pre-emption of state law antitrust claims; and (5) failure to allege a relevant market.

The District Court, the Honorable William Pauley, considered only the implied immunity affirmative defense, and dismissed on that ground. The District Court reasoned that, if the federal antitrust claims were barred, the state law antitrust claims were barred as well. Neither the District Court nor the Court of Appeals expressed any consideration of the other four grounds of dismissal.

competitors – conduct that was previously encouraged by the antitrust laws – was challenged in *Trinko*. *Id.*

This Court reasoned in *Trinko*:

> (a) that The Sherman Act is indeed the "Magna Carta" of free enterprise", *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L.Ed.2d 515 (1972). 540 U.S. at 415-416;
>
> (b) but "we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors". 540 U.S. at 411; and
>
> (c) that the duties imposed on incumbent local exchange carriers ("LEC") by the Telecommunications Act did not justify a modification of traditional (no duty to aid competitors) principles in part because Congress expressly provided that "nothing in this Act or the amendments made by the Act shall be construed to **modify** . . . the antitrust laws". [emphasis supplied] (*Id.* 406).

Accordingly, in *Trinko*, the conduct alleged to constitute a Section 2 violation was **permitted** under traditional antitrust principles. Pleading alchemy designed to re-jigger that conduct into an antitrust violation was rejected for failure to state a claim. And the denial of implied immunity was upheld. *Id.*

C. In *Gordon*, The Conduct Was Mandated By Rule And, Therefore, Not Conspiratorial At All

In *Gordon*, for decades, brokerage firms did not conspire to set their brokerage omissions because the New York Stock Exchange itself fixed the commissions. *Gordon* at 662. Thus, the brokers engaged in the benign conduct of complying with an Exchange rule.

Clearly, the reprehensible conduct alleged here is much worse than that which this Court rescued with certiorari in *Trinko* and *Gordon*. There is absolutely no need for this busy

Court to rescue the reprehensible conduct here. On the contrary, Petitioners should be left to shift for themselves.

IV. BECAUSE THERE HAVE BEEN NO FURTHER LAWSUITS, NO ALLEGED RECURRENCE OF THE "EPIC" CONSPIRACY, AND NO DOJ OR SEC REQUEST FOR *CERTIORARI*, MANY FACTORS THAT JUSTIFIED *CERTIORARI* IN PRIOR SUITS ARE WHOLLY ABSENT HERE

The conduct challenged here consists of a *sui generis*, non-recurring "epic" conspiracy. App. at 1a. Thus:

- in the five-plus years since this action was filed, not one further antitrust complaint challenging the reprehensible (but non-recurring) conduct here has been filed, and
- the DOJ and the SEC have refrained (a) from filing a brief concerning certiorari here, and (b) from voluntarily filing any amicus briefs below. Instead, the DOJ and SEC merely responded to requests from the Courts below.

In contrast, in *Gordon* , the challenged conduct affected everyone who transacted on the New York Stock Exchange, and spawned dozens of different cases as well as decisions of different Circuit Courts over almost a decade. *See, e.g., Thill Securities Corporation v. New York Stock Exchange*, 633 F.2d 65, 68 (7th Cir. 1980); *Kaplan v. Lehman Bros.*, 389 U.S. 954, 954 - 56 (1967). Although this Court, in an era of substantially fewer petitions for certiorari, initially denied the certiorari petitions concerning the challenged conduct at issue in *Gordon*, it ultimately did grant the petition. *Compare, Kaplan, supra*, 389 U.S. at 954 - 56 (Warren, C.J., dissenting) *with* 419 U.S. 1018 (1974).

The challenged conduct here is a *sui generis* relic from the time capsule of Petitioners' reprehensible but non-recurring alleged "epic" conspiracy. Therefore, important reasons for granting *certiorari* in *Gordon* — the frequent litigation reason, the strongly expressed governmental

interest reason, and the widespread, on-going conduct reason – are all wholly absent here.

V. THE DECISION QUOTES FROM AND IS FULLY CONSISTENT WITH THIS COURT'S "PERVASIVE REGULATION" ANTITRUST IMMUNITY DECISIONS IN *NATIONAL GERIMEDICAL* AND *NASD*

With regard to the "pervasive regulation" form of antitrust immunity, the Decision below again painstakingly cited to and painstakingly quoted from this Court's prior authority. *E.g.*, App. at 67a-70a.

A. Petitioner's Misquotes And Incorrect Criticisms Do Not Present Grounds For Certiorari

Arguing that immunity should be implied here because "the conduct at issue is subject to a pervasive regulatory scheme," Pet. at 5, Petitioners erroneously assert that the Decision "suggested that [pervasive regulation] may apply only 'where the activities of an SRO, extensively regulated by the SEC, are challenged as anticompetitive,' which is not the case here." Pet. at 11. Petitioners then argue that the Court below misconstrued *NASD* as "immuniz[ing] only 'association activities approved by the SEC' [and] turn[ing] on the 'special status' of the NASD as an SRO." Pet. at 21.

First, the Court below never stated or "suggested" that pervasiveness of regulation could immunize "only" SRO conduct. Rather, the Decision stated that "[t]he *primary illustration* of possible pervasive regulation is the situation where the activities of an SRO, extensively regulated by the SEC, are challenged as anticompetitive." App. at 50a (emphasis supplied).

Nor did the Court view *NASD* as immunizing only association activities or turning on SRO status. What the Court of Appeals actually said was that *NASD* involved two considerations: "one arising directly from the particular 'pervasive' regulatory relationship between the SEC and

the NASD . . . and the other arising derivatively from the 'fatal,' 'close relationship' between the alleged conspiracy and conduct the Court had already concluded was not only impliedly immune but actively encouraged by the SEC." App. at 68a (citations omitted). Distinguishing the facts here from those in *NASD*, the Court of Appeals stated that "[p]ervasive immunity of the second, derivative sort is impossible here, as the securities statutes do not specifically immunize the underlying tie-in arrangements." *Id.* It then considered "whether the regulations here are 'pervasive' like the SEC's regulations of the NASD were held to be in *NASD*." *Id.*

Once again, the Court of Appeals found this case factually distinguishable from *NASD*, since unlike Petitioners, the NASD "itself serves as a semi-private regulator over the complex and unique securities industry but does so under the ever-watchful and omnipresent eye of the SEC . . . . [such] that the decisions of the regulated (*i.e.*, the NASD) could be seen as the acts of the regulator." *Id.* The pervasiveness of the regulation in *NASD* was manifested through the SEC's ultimate authority over the NASD's own actions as a regulator. Thus, the Decision concluded that while Petitioners' conduct "may be subject to regulation and control by the SEC in great detail, that does not mean that the SEC approved those acts as it did in *NASD*." *Id.* at 68a-69a.

The Court of Appeals neither misread *NASD* nor created any conflict with other Circuit court decisions[12] in thus factually distinguishing *NASD* from this case. Further, the facts here present a far stronger case against immunity than the non-profit conduct challenged in *National* Gerimedical, but this Court rejected implied immunity in that case.

The Decision is fully consistent with this Court's prior precedent and certiorari is wholly unwarranted.

12. *E.g., Austin Mun. Sec. v. National Ass'n of Sec. Dealers*, 757 F.2d 676 (5th Cir. 1985) (NASD disciplinary procedures impliedly immune as subject to pervasive SEC oversight and authority in promulgation and enforcement); *Thill Sec. Corp. v. New York Stock Exch.*, 633 F.2d 65 (7th Cir. 1980) (former Exchange rule forbidding sharing of commissions with non-members immune as consistently treated as component of fixed-commission rate system subject to SEC review and approval); *Harding v. American Stock Exch.*, 527 F.2d 1366 (5th Cir. 1976) (disciplinary rules immune as long approved subject to pervasive SEC regulation).

B. Antitrust And Restraint Of Trade Prosecutions Of Conduct Occurring In The Securities Markets Have Been Well Publicized For A Century But Congress Continues To Include A Savings Clause In The Federal Securities Laws

Beginning before their federal statutory incarnation, the antitrust and restraint of trade laws have been applied to conduct on securities exchanges (*Silver*) and commodity exchanges,[13] conduct involving the manipulation (*see* cases collected in fn. 8 *supra*) of securities prices,[14] collusive conduct by brokers to inflate their market-making charges for aftermarket of trading (*see* cases collected in fn. 7), or their underwriting charges for specified types of initial public offerings,[15] and conduct by investment banks to boycott or to divide markets. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148 (5th Cir. 1992) (antitrust immunity denied for boycott claim alleging that several brokerage firms had violated Section 1 of the Sherman Act by offering services in contracts that contained the same mandatory arbitration clause); *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953) (epic decision finding that U.S. failed to prove that leading investment banks agreed to refrain from competition for customers and to divide markets).

Despite these repeated antitrust prosecutions and the considerable publicity concerning same, Congress has not exempted conduct in the securities markets from the antitrust laws. Rather, in enacting, re-enacting, and amending the federal securities laws for seventy-plus years,

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13. *United States v. Patten*, 226 U.S. 525, 335 S.Ct. 141 (1913); *Board of Trade of City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 25 S.Ct. 637 (1905); *Strobl v. N.Y. Merc. Exch.*, 768 F.2d 22 (2d Cirl 1985).

14. *Livermore v. Bushnell*, 12 N.Y. Sup. Ct. (5 Hun.) 285 (1885) (condemning and enjoining agreement to inflate stock prices as an unlawful restraint of trade).

15. *In re Public Offering Fee Antitrust Litig.*, 2004 WL 350696 (S.D.N.Y. Feb. 25, 2004).

Congress has (with one exception for certain class actions arising under state law) retained one constant:

> the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Securities Act § 16(a), 15 U.S.C. § 77p(a); *see also* Securities Exchange Act § 78(a), 15 U.S.C. § 78bb(a) (similar savings clause).

Congressional intent to "pervasively regulate" the securities markets is contraindicated by Congress' repeated inclusion of a clause "saving" investors' well-established, highly-publicized rights and remedies under, among other laws, the federal antitrust laws.

VI. THE DECISION IS CONSISTENT WITH OTHER CIRCUITS' IMPLIED ANTITRUST IMMUNITY DECISIONS

Buried in their Petition, Petitioners briefly argue that specified Circuit Courts have articulated different antitrust immunity criteria from the Decision's. Petition pp. 25 - 26. But the decisions cited by Petitioners have quoted or articulated the same criteria as is quoted from the Decision at pp. 1-2 hereof. *Austin Municipal Securities Inc. v. National Association of Securities Dealers*, 757 F.2d 676, 694 (5th Cir. 1985) ("Implicit repeal of the antitrust laws is not favored, and is justified only by a clear showing of repugnancy between the antitrust laws and the regulatory system.") (citations omitted); *Thill Securities Corporation v. New York Stock Exchange*, 633 F.2d 65, 68 - 69 (7th Cir. 1980) ("The test to be applied, the Court held, was 'whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work[.]'") (*citing Gordon*, 422 U.S. at 686); *Harding v. American Stock Exchange, Inc.*, 527 F.2d 1366, 1370 (5th Cir. 1976) ("Immunity under the Sherman Act is necessary in this case to make the Exchange Act viable.").

The Decision is wholly consistent with the decisions of other circuits, and expressly cited to *Austin* and *Harding*.

VII. THE PROSECUTION OF PRIOR ANTITRUST CLAIMS AGAINST CONDUCT IN THE SECURITIES MARKETS HAS CONSISTENTLY PROMOTED PUBLIC TRUST IN THE MARKETS AND CAPITAL RAISING

A. Antitrust Claims Have Produced Untold Billions Of Dollars In Investor Savings

One key to capital raising is investor trust and confidence in the markets. Far from "chilling" capital raising, prior antitrust prosecutions have saved investors billions of dollars and had beneficial effects upon investors' trust in the securities markets. For example, after the filing of the *Nasdaq* antitrust claims by dozens of investors (*see* fn. 7 *supra*), NASDAQ spreads decreased dramatically and the NASDAQ trading volume increased dramatically. *See In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119 (S.D.N.Y. 1997); *United States v. Alex. Brown & Sons Inc., et al.*, No. 96-cv-5313(RWS), *Competitive Impact Statement*, at 31 n.15 (S.D.N.Y. July 17, 1996) (available at www.Usdoj.gov/atr/cases/fo700/0739.htm).

During 1993, NASDAQ accounted for 43% of the NYSE volume. Division of Market Regulation, *Market 2000: An Examination of Current Equity Market Developments* (SEC January 1994) (available at *http://www.sec.gov/divisions/marketreg/market2000.pdf*). By March of 1996, NASDAQ share volume was 121 percent of the NYSE volume for the year, comprising 54 percent of the volume traded in all U.S. equity markets combined. *Id. Self-Regulatory Organizations; Notice of Filing of Amendment No. 2 to Proposed Rule Change by National Assoc. of Securities Dealers, Inc. Relating to the NAqcess System and Accompanying Rules of Fair Practice*, Rel. No. 34-37302, 61 F.R. 31574-01, at 31590 (SEC June 20, 1996).

Thus, when the antitrust claims alleged in *Nasdaq* terminated the prior collusion, investors greatly benefited. Further, the end to collusion was in the enlightened self-interest of Nasdaq marketmakers because fair, competitive charges meant much more investor trust, lower transaction

costs, higher trading volume and more company listings on *Nasdaq*.

In contrast, the antitrust prosecutions of the SEC-mandated, fixed stock brokerage commissions were initially and ultimately unsuccessful. *See, e.g., Kaplan v. Lehman Bros.*, 389 U.S. 954 (1967); *Gordon, supra*. However, they prompted many thinking people to question the wisdom of the SEC's oversight in permitting fixed commissions. *Compare Kaplan, supra*. Under this antitrust and public scrutiny, SEC policy changed. On May 1, 1974, fixed commissions ended, and the groundwork was laid for discount brokers and additional billions of dollars in investor savings.

B. One Reason Why Antitrust Prosecutions Have Been So Beneficial To The Securities Markets Is Explained By The Nobel Prize-Winning Economic Theory That The Regulatory Agency Is "Captured" By The Regulated

In part of the body of work for which he was awarded the Nobel Prize in 1982, Professor George Stigler stated: "A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit." George Stigler, The Citizen and the State, Essays on Regulation, p. 114 (1975); *id.* at p. 185; *see also* Jean-Marie Gagnon, *Policing the Securities Industry – Do we need a national regulator?*, Globe and Mail, January 28, 2004 ("Years ago, the late George Stigler (who won the Nobel Memorial Prize in Economic Science in 1982) suggested that regulators tend to be captured by the regulated . . . Consequently, there is a tendency, in the long run, for the regulator to become an intellectual prisoner of the regulated.").

Although some later economic studies have reduced "captured" to "disproportionately influenced"[16], the

16. *Compare*, Gary Becker, Journal of Law and Economics, Vol. 19, No. 2, Conference on the Economics of Politics and Regulation, pp. 245 – 248 (August 1976) ("The economic approach to political behavior has (Cont'd)

phenomenon described by these papers is one plausible or partial explanation of why antitrust prosecutions in the securities markets have directly (as in *Nasdaq*) or indirectly (by focusing public scrutiny to overcome "capture" as in *Kaplan v. Lehman* and *Gordon*) had such a beneficial effect on the markets and investors.

The prosecution of this case will not chill capital raising, and will likely be in the enlightened self-interest of Petitioners and the friends of the Court (actually friends of Petitioners) who fear it.

VIII. THE SEC AND THE DOJ HAVE NOT FILED A BRIEF CONCERNING CERTIORARI IN THIS COURT, DID NOT VOLUNTARILY FILE ANY BRIEFS IN THE COURTS BELOW, AND THE SECURITIES LAWS AND SEC HAVE ALWAYS TRIED TO STOP THE REPREHENSIBLE CONDUCT CHALLENGED HERE

Petitioners' last supposed ground for certiorari is a supposed conflict between the DOJ and SEC. However, the DOJ and SEC have previously cooperated together on many joint investigations of conduct that violated both the antitrust laws and the securities laws (App. 206a fn 6), and they **agree** that the reprehensible conduct here has always violated both. *See* II A and B *supra*.

Indeed, Congress and the SEC have been trying to stop tie-ins and laddering agreements for seven decades. *See* pp. 13-16 *supra*. Further, the SEC concedes that it can foresee no circumstances in which it would ever purport to permit these agreements. App. at 189a-192a. Thus, the only relatively small conflict arises from the SEC's following statement:

> Current precedent does not, however, foreclose the Commission's ability in response to future developments

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frequently been said to imply that producers rather than consumers gain from legislation, that legislation does not promote the 'general welfare' because it is 'captured' by producers. As a result of the emphasis on 'capture,' several studies have tried to determine when firms in an industry can act collectively to promote their interests.").

> to authorize conduct by underwriters that could be characterized as a tie-in or laddering." For example, **while it is difficult to envision the circumstances under which the Commission would do so**, the Commission could approve an SRO [self-regulatory organization] rule that permitted such conduct, **assuming that the statutory requirements under the Exchange Act were met,** including the requirements that the rule be designed to protect investors and the public interest, and **that it not impose any burden on competition not necessary or appropriate in** furtherance of the purposes of the act.

App. at 191a, SEC Letter, p. 3 (emphasis supplied).

The SEC's foregoing attempt to capture the maximum future authority for itself in circumstances which are "difficult to envision" (and will never occur) merely recites perfunctorily some of the definitional conditions within which the SEC can promulgate a new rule. This perfunctory recitation is meaningless, tautological, and could be equally asserted with respect to any pernicious practices. Indeed, the only authority that federal agencies (and SROs) possess to make rules, is the authority to make rules **consistent** with Congressional purpose and statute. *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (regulations contrary to the manifest purposes of Congress in enacting variable re-enlistment bonus program were invalid); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-199 (1976) (rejecting SEC's interpretation of statutory language in Section 10(b) as encompassing liability for negligence where words in the statute contradict such interpretation).

Here, Congressional purpose is to stop pools, laddering, and tie-ins. *See* App. at 11a-16a. Although we assert that the SEC has no power to permit the laddering and tie-in practices alleged here, it is nonetheless clear that the real conflict between DOJ and SEC is limited to speculation about unforeseen, unlikely future events that would be contrary to seventy years' experience. This is no basis for certiorari.

CONCLUSION

For the foregoing reasons and authorities, the Petition should be denied.

Respectfully submitted,

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